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CASE NO.

in the
Supreme Court
of the
United States

October Term 1982

ARNOLDO ALVAREZ,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DECISION BELOW, AFFIRMING THE INTRODUCTION OF CO-CONSPIRATOR HEARSAY STATEMENTS WITHOUT ANY REQUIRED FINDINGS BY THE TRIAL JUDGE OR LIMITING INSTRUCTIONS TO THE JURY CONCERNING THE PERMISSIBLE USE OF SUCH STATEMENTS, CONFLICTS WITH FEDERAL APPELLATE DECISIONS AND DEPRIVES PETITIONER OF DUE PROCESS?

2. WHETHER THE DECISION BELOW, AFFIRMING PETITIONER'S CONVICTION, IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS, WHERE THE EVIDENCE DID NOT ESTABLISH PETITIONER'S KNOWING AND VOLUNTARY PARTICIPATION IN A CRIMINAL ACT?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the State of Florida.

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ARNOLDO ALVAREZ,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

Petitioner, ARNOLDO ALVAREZ, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the Florida Third District Court of Appeal entered in Case No. 81-1034, which affirmed the decision of the Circuit Court of the Eleventh Judicial Circuit of Florida. *Alvarez v. State*, 419 So.2d 348 (Fla. 3d DCA 1982).

OPINIONS BELOW

The opinion of the Florida Third District Court of Appeal is reported as *Alvarez v. State*, 419 So.2d 348 (Fla. 3d DCA 1982). A copy of this decision is reproduced in the Appendix to this petition. Rehearing was denied by the appellate court on October 8, 1982, which is also contained in the Appendix. The trial court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property without due process of law. . .

U.S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . .

U.S. Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

On December 11, 1980, ARNOLDO ALVAREZ and four others were charged with the unlawful sale of more than twenty grams of marijuana and possession with intent to sell that same amount of contraband. During the pre-trial preparation period, ALVAREZ sought a dismissal of the charges by filing a sworn motion to dismiss, which resulted in the dismissal as to the possession charge. Petitioner was tried before a jury on the remaining charge and found guilty. He was thereafter placed on probation for a period of five years, with the special condition that he serve one year in the county jail. Petitioner sought appellate review in the Florida Third District Court of Appeal, wherein he raised two issues, to wit: insufficiency of the evidence and the improper admission of co-conspirator hearsay statements. The District Court affirmed the conviction in a per curiam order. *Alvarez v. State.* 419 So.2d 348 (Fla. 3d DCA 1982).

As presented at trial, this case involved the sale of approximately 400 pounds of marijuana by Petitioner and four others. The case began on November 17, 1980, in Gainesville, Florida, when undercover Officer Squires became involved in telephone negotiations with Francisco Montiel and Antonio Toca for the purchase of marijuana. Because the sellers were believed to be from Hialeah,

Florida and would not travel to Gainesville to perfect the sale, Squires contacted Detective Robert Schlafke of the Hialeah Police Department, Special Investigations Unit, for the purpose of attempting to complete the transaction.

Detective Schlafke, operating in an undercover capacity, contacted Montiel by telephone and advised Montiel that he (Schlafke) was a partner of Squires and that he was interested in coming to South Florida to complete the negotiated sale. During the initial phone conversation, Montiel agreed; he also cautioned Schlafke that the word "malangas", a Spanish word for a type of fruit, would be used as a code whenever marijuana was discussed.

At 10:30 a.m. on November 20, 1980, as arranged, Schlafke arrived at a nursery, met Montiel, and was introduced to Antonio Toca. Toca was identified as the person having the connection to the marijuana. The discussions concerning the details of the transaction took place between Schlafke and Montiel. At noon the same day, Montiel agreed to show Schlafke a sample of the marijuana. Toca made a telephone call and soon an individual later identified as Jose Alvarez came to the nursery.[1]

The group then drove in two separate vehicles to Montiel's townhouse. At the house, Jose Alvarez showed Schlafke a fifty-pound sample of marijuana. Negotiations concerning the price and quantity of the transaction continued, with Schlafke finally agreeing to purchase

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[1]Jose Alvarez is not in any way related to Petitioner ARNOLDO ALVAREZ.

up to 1000 pounds of marijuana for $240 per pound. Schlafke then went back to his office to arrange for a truck to carry the marijuana. That afternoon, Schlafke called Montiel to say that he was ready to complete the deal. Schlafke returned to Montiel's townhouse at 5:00 p.m. and again met with Montiel and Toca. Schlafke would not complete the transaction, however, until he saw the marijuana.

The fifty-pound sample was placed in Schlafke's van. The trio — Montiel, Toca and Schlafke — then drove to a residence located at 2745 S.W. 92 Avenue. At this point, Toca drove the van through the gateway at the direction of Jose Alvarez.

Schlafke then followed Montiel and Toca into the house through the back door. Carlos Garcia remained outside. In the dining room, Jose Alvarez said that the marijuana was available. Montiel had turned on the television set while further discussions as to the price, quantity, and quality of the marijuana took place. Jose Alvarez then went outside the house into the backyard and took a box from a truck. He returned with the box and placed it on the floor of the family room. In the presence of Montiel, Toca, and Jose Alvarez, Schlafke looked in the box at the marijuana inside. Jose Alvarez then brought in another box which also contained marijuana. Schlafke then agreed that he would call "his people" to have the money delivered. Schlafke then placed a phone call to other undercover officers who played the role of the money men.

While awaiting the arrival of the money, Schlafke and others were drinking beer. Several people walked in and out of the house during this time; general marijuana

discussions continued. After Schlafke made the phone call, Petitioner, ARNOLDO ALVAREZ, entered the house with two or three others. Schlafke did not know if the door was locked, but saw Petitioner remove what appeared to be a key from the door. Petitioner greeted Jose Alvarez and conversed with him for a brief time in Spanish. Schlafke did not know what was said to Jose Alvarez. Schlafke did not know where in the house Petitioner went, but after ten minutes, Petitioner came to the dining room area, where Toca, Jose Alvarez, and Schlafke were sitting, and spoke to Jose Alvarez. Petitioner then sat down at the table and, in the view of Schlafke, took a piece of paper from his pocket. After a brief conversation between Petitioner and Jose Alvarez, Petitioner appeared to be writing something on the paper. Schlafke did not know what, if anything, Petitioner was writing. Then, Petitioner gave the paper to Jose Alvarez. Schlafke did not know the significance of any of the things written on the paper, but surmised that they referred to the weights of various bales of marijuana. From their location in the dining area, the marijuana boxes situated in the family room were not visible. Petitioner was never actually in possession of the contraband.

Schlafke and Jose Alvarez then left the house to await the arrival of the money men. Sergeants Pugliese and Angulo arrived with the money. As soon as they entered the house, they revealed their true identities and placed everyone under arrest. At the time of the arrest, Petitioner was watching television.

At trial, several individuals testified on Petitioner's behalf, including Toca, who stated that ARNOLDO ALVAREZ was not in any way involved in the marijuana

transaction. His whole reason for being at the house was to locate Pepe, a mechanic who worked for Petitioner. Since Pepe was expected to arrive at the house momentarily, Petitioner was told to wait around. Petitioner wrote the numbers on the paper at the specific request of Jose Alvarez, who is illiterate. Petitioner only wrote what Jose Alvarez told him to write.

Petitioner testified on his own behalf that he was not involved in the marijuana transaction at all. He only came to the house to find a mechanic named Pepe, who is employed at his service station. Petitioner did a favor for Jose Alvarez by writing the numbers on a piece of paper. Because he speaks no English, Petitioner was not privy to any conversations about marijuana.

On rebuttal, the State recalled Officer Schlafke, who testified that Petitioner was introduced by Jose Alvarez as a partner and bookkeeper. This introduction was done in English.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AFFIRMING THE INTRODUCTION OF COCONSPIRATOR HEARSAY STATEMENTS WITHOUT ANY REQUIRED FINDINGS BY THE TRIAL JUDGE OR LIMITING INSTRUCTIONS TO THE JURY CONCERNING THE PERMISSIBLE USE OF SUCH STATEMENTS, CONFLICTS WITH FEDERAL APPELLATE DECISIONS AND DEPRIVES PETITIONER OF DUE PROCESS.

The role of both a judge and jury in determining the extent and involvement of a defendant in a criminal conspiracy is a matter of current judicial discussion. There is no doubt that it is a subject which requires very close supervision and scrutiny by our judicial system because of the serious potential for abuse. In every criminal case, it is a jury's obligation to determine a person's guilt on the basis of his own conduct and declarations. *See, e.g., United States v. Martorano*, 557 F.2d 1 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978). With regard to this legal maxim, it is a recognized principle that hearsay evidence, unless specifically excepted by statute or common law, is inadmissible as evidence against a party. *E.g., California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970). One of the reasons underlying this evidentiary exclusion is to comport with the constitutional guarantee of confrontation of witnesses. *See Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970); *California v. Green, supra; United States v. Medico*, 557 F.2d 309 (2d Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 614 (1977).

In the context of coconspirator hearsay statements, courts and legislatures have generally determined them to be allowable evidence[2] on the theory that they are vicarious admissions of a defendant's agents. *E.g., Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702, 47 S.Ct. 102 (1926) (L. Hand, J.). In order to protect against the severe prejudice that could flow from the too casual use of these declarations, a

[2]Florida law provides that coconspirator statements are exceptions to the hearsay rule. §90.803(18)(e), *Fla. Stat.* Federal law admits such declarations on the theory that they are *not* hearsay. F.R.E. 801(d)(2)(E).

stringent set of foundation predicates is required. Those include proof by a preponderance of the evidence that a conspiracy existed, that the accused was a member of the conspiracy, and that the declarations were made during the course and in furtherance of the conspiracy. *E.g., United States v. James*, 590 F.2d 575 (5th Cir. en banc), *cert. denied*, 442 U.S. 917 (1979); *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977). A finding that these elements have been satisfied is to be made by the presiding judge and/or the jury. *United States v. Whitley*, 670 F.2d 617, 621 (5th Cir. 1982); *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

In the present case, damaging statements of an alleged coconspirator were admitted against Petitioner in the absence of any of the safeguards outlined above. The trial judge made no finding that the hearsay testimony was admissible under the coconspirator statement exception to the hearsay rule. Moreover, the judge did not instruct the jury as to the limited use of the hearsay declarations and the requirements which must first be established before consideration thereof. In short, the case was tried and Petitioner was convicted on the basis of testimony which he was not able to confront. There was no finding that would assure Petitioner that his constitutional rights had been safeguarded and that this questioned evidence was admissible because it was legally reliable. We submit that the action of the Florida Third District Court of Appeal in affirming Petitioner's conviction which was tainted by this constitutional defect is contrary to the fundamental precepts of our justice system. Where the Florida judiciary makes absolutely no provision for the protection of an accused against improper hearsay evidence, and where

2. THE DECISION BELOW, AFFIRMING PETITIONER'S CONVICTION, IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS, WHERE THE EVIDENCE DID NOT ESTABLISH PETITIONER'S KNOWING AND VOLUNTARY PARTICIPATION IN A CRIMINAL ACT.

In all criminal cases, the prosecution has the responsibility of proving every element of the crime charged beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. *In Re Winship, supra* (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the State of Florida, through the decision of the Third District Court of Appeal, has effectively imposed an altogether new standard of criminal responsibility in situations where an individual is found within the same home as several hundred pounds of marijuana. It is submitted that this emerging standard is completely erroneous and is contrary to well established notions of criminal culpability. The conclusion of the

appellate court ought to be reviewed by this Court for the very simple reason that if unchecked, this standard will impose liability upon every individual who, because of mere association, happens to be in a location at the same time that a drug deal is taking place. Petitioner should not be made to suffer for the sins of others.

The situation now presented to this Court is controlled by a substantial body of precedent which was, unfortunately, not applied to the case. The record presented to the appellate court reveals that Petitioner did not knowingly or purposefully immerse himself into an ongoing marijuana venture. The proof, which is easily summarized, shows none of the intentional participation which is required to make one guilty of sale of a controlled substance. Taken in the prosecution's best light, the proof only shows that Petitioner first arrived at the location of the aborted sale of marijuana after negotiations had been completed. He greeted one of the defendants, whom he knew, in Spanish because he speaks no English. His purpose in arriving at the residence was to await the return of Pepe the mechanic. Petitioner at no time possessed any marijuana. While seated at a table with two participants in the attempted sale and the undercover officer, Petitioner engaged in a brief Spanish-language conversation with one of the participants. As a result of the conversation, Petitioner wrote a series of numbers upon a sheet of paper. Although the numbers did not correspond to any particular packages of marijuana, the undercover officer believed that Petitioner's writing represented the weights of marijuana bales. In an English-language conversation, one of the participants identified Petitioner as a partner in the enterprise.

The controlling facts in this case mandate the entry of a judgment of acquittal since there is no proof beyond a reasonable doubt of Petitioner's involvement in the marijuana sale. This is the result reached by the Fifth Circuit Court of Appeals in *Newsom v. United States*, 335 F.2d 237 (5th Cir. 1964), a case with which the instant decision conflicts. Newsom was convicted of sale of marijuana. The proof showed that he associated with an individual who was engaged in a sale of contraband and was actually present when the sale took place. The other individual also stated to an undercover agent that both he and Newsom had the marijuana for sale. On these facts, the appellate court held the evidence to be insufficient:

> Here the most that can be drawn from the evidence concerning appellant's involvement in the transaction in the car is that he saw what was going on and engaged in conversation. Mere presence at the scene of a criminal offense does not support an inference of guilt of that offense. Nor do we think that the verdict can be supported by Fenlaw's testimony of admissions by Linton in the car concerning future sales of marijuana made in the presence of appellant. These admissions did not relate to the present transaction.
>
> The Government failed to prove that Newsom, the appellant, had knowledge that his car, which he was driving, was carrying Linton to a place where a marijuana sale was to be made. There was no evidence that Newsom knew marijuana was being transported in his car. It was not shown that he handled the marijuana or received

> any of the money paid for it. Subsequent conversations as to other marijuana cannot furnish a basis for the conviction of the offense here charged. The proof was not enough. (Citations omitted).

Petitioner's plight is similar to that of Newsom, except that Newsom obtained relief while Petitioner has been convicted of a crime for which the evidence is deficient. We submit that it is incumbent upon this Court to review the standard of evidentiary sufficiency utilized by the Florida Third District Court of Appeal. That standard casts too broad a net and causes disharmony with respect to constitutional principles of sufficiency of evidence. This Court must correct the injustice to Petitioner who was improperly trapped therein.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Florida Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of December 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Honorable Steven Jacob, Assistant Attorney General, 401 N.W. Second Avenue, Room 820, Miami, Florida 33128.

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE

Arnoldo ALVAREZ,

Appellant

v.

The STATE of Florida,

Appellee.

No. 81-1034.

District Court of Appeal of Florida,
Third District.

Aug. 17, 1982.

Rehearing Denied Oct. 8, 1982.

Appeal from Circuit Court, Dade County, Thomas E. Scott, Judge.

Bierman, Sonnett, Beiley & Shohat and Benedict P. Kuehne, Miami, for appellant.

Jim Smith, Atty. Gen. and Steven R. Jacob, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, BASKIN and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed. *Milazzo v. State*, 377 So.2d 1161 (Fla. 1979); *Tresvant v. State*, 396 So.2d 733 (Fla. 3d DCA 1981); *United States v. Leaman*, 546 F.2d 148 (5th Cir. 1977).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1982
FRIDAY, OCTOBER 8, 1982

ARNOLDO ALVAREZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 81-1034

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE Clerk District Court of Appeal, Third District

By: _____
Deputy Clerk

cc: Benedict P. Kuehne
Steven Jacob